

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Thurgood Marshall United
States Courthouse, 40 Foley Square, in the City of New York,
on the 7th day of March, two thousand thirteen.

PRESENT: DENNIS JACOBS,
Chief Judge,
ROSEMARY S. POOLER,
Circuit Judge,
ERIC N. VITALIANO,
District Judge.*

- - - - -X
JOSEPH S. D'AGOSTA, THOMAS MAISANO,
Plaintiffs-Appellants,

-v.-

12-1203

DR. FRANCIS J. HARVEY, SECRETARY,
DEPARTMENT OF THE ARMY,
Defendant-Appellee.

* The Honorable Eric N. Vitaliano, District Judge of
the United States District Court for the Eastern District of
New York, sitting by designation.

1 **FOR APPELLANTS:**

Dennis L. Friedman,
Philadelphia, Pennsylvania.

4 **FOR APPELLEE:**

Varuni Nelson, Assistant United
States Attorney (Seth D.
Eichenholtz, Assistant United
States Attorney, on the brief)
for Loretta E. Lynch, United
States Attorney, Eastern
District of New York, Brooklyn,
New York.

13 Appeal from a judgment of the United States District
14 Court for the Eastern District of New York (Gershon, J.).
15

16 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
17 **AND DECREED** that the judgment of the district court be
18 **AFFIRMED.**
19

20 Plaintiffs-Appellants Joseph S. D'Agosta and Thomas
21 Maisano appeal from the judgment of the United States
22 District Court for the Eastern District of New York
23 (Gershon, J.), granting summary judgment in favor of
24 Defendant-Appellee Dr. Francis J. Harvey, in his capacity as
25 Secretary of the Army. We assume the parties' familiarity
26 with the underlying facts, the procedural history, and the
27 issues presented for review.
28

29 D'Agosta and Maisano filed this sex and age
30 discrimination action arising from a dispute with a co-
31 worker, Eileen Barry. Their suit alleged that, following a
32 complaint by Barry accusing them of inappropriate workplace
33 behavior,¹ the Army Corps of Engineers ("Army Corps")
34 conducted a seriously flawed investigation that led the Army
35 Corps to accept Barry's allegations at face value due to her
36 gender. The process ultimately ended in formal reprimands
37 and downgraded performance appraisals for both men.
38

¹ This behavior included playing sound bites such as
wolf whistles when female employees would pass by their
desks and repeatedly questioning Barry about her
relationship with another employee.

1 After Appellants filed grievances with the Army Corps,
2 their union invoked the arbitration clause in the parties'
3 collective bargaining agreement, triggering a thirteen-day
4 arbitration hearing involving sixteen witnesses. The
5 arbitrator found no discrimination, and the Equal Employment
6 Opportunity Commission upheld the arbitrator's decision.
7 The current action was filed in the United States District
8 Court for the District of New Jersey, which then transferred
9 the case to the Eastern District of New York. On July 13,
10 2011, the court granted the Army Corps' motion for summary
11 judgment.

12
13 This Court reviews de novo a district court's grant of
14 summary judgment. See Tepperwien v. Entergy Nuclear
15 Operations, Inc., 663 F.3d 556, 567 (2d Cir. 2011).

16
17 On appeal, Appellants argue broadly that the district
18 court "failed to adhere to summary judgment principles."
19 Pet'r Br. 10. The record shows otherwise. The district
20 court properly set forth and applied well-established
21 principles of summary judgment under Federal Rule of Civil
22 Procedure 56. See SA 11-12. The court then applied the
23 McDonnell-Douglas burden-shifting framework in assessing
24 Appellants' discrimination claims. See SA 12-18 (employing
25 the standard set forth in McDonnell-Douglas Corp. v. Green,
26 411 U.S. 792, 802-05 (1973)).

27
28 Appellants assert, in conclusory fashion and without
29 record citation, that the district court ignored triable
30 issues of fact. However, the court's thorough and well-
31 reasoned opinion concluded [i] that the Army Corps provided
32 a legitimate, non-discriminatory reason for its actions--the
33 need to investigate alleged misconduct in the workplace; and
34 [ii] that Appellants "proffered insufficient evidence, other
35 than the minimal evidence necessary to establish their prima
36 facie case," that the agency's actions were motivated by age
37 or sex bias. SA 16-17. Appellants provide no basis for
38 questioning this decision.

39
40 In addition, the court properly attached weight to the
41 arbitrator's findings. See Collins v. N.Y.C. Transit Auth.,
42 305 F.3d 113, 119 (2d Cir. 2002) (holding that an
43 independent and unbiased arbitration decision rendered after

1 an evidentiary hearing and based on substantial evidence "is
2 highly probative of the absence of discriminatory intent").
3

4 For the foregoing reasons, and finding no merit in
5 D'Agosta and Maisano's other arguments, we hereby **AFFIRM** the
6 judgment of the district court.
7

8 FOR THE COURT:

9 CATHERINE O'HAGAN WOLFE, CLERK
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